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Supreme Court, U.S.
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NO. _____

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IN THE
SUPREME COURT OF THE UNITED STATES

****

JAMES E. GUESMAN,
PETITIONER,

VERSUS

STATE OF NEVADA,
RESPONDENT.

****

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEVADA

****

PETITION FOR WRIT OF CERTIORARI

****

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QUESTION PRESENTED FOR REVIEW

Whether the Supreme Court of Nevada Denied Petitioner's Right to Due Process of Law Under the Fourteenth Amendment to the United States Constitution in Not Ordering the District Court to Review all of the Evidence in the Trial Transcript, Pursuant to Jackson v. Virginia, 443 U.S. 307 (1979).

THE PARTIES TO THE PROCEEDING

The parties to this proceeding are the Petitioner, James E. Guesman and the Respondent, State of Nevada.

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Order Denying Petition for Writ of Certiorari
Nevada Supreme Court Case No. 35435
Dated January 5, 2000
Appendix, Exhibit "B"

I
OPINIONS BELOW

Petitioner, JAMES GUESMAN, a Nevada attorney, was convicted of domestic battery in Las Vegas Township Justice Court in Las Vegas, Nevada, on October 9, 1998, and received inter alia, two (2) days in jail together with other punishment. This jail time has not been served. Guesman appealed to the Eighth Judicial District Court for a review of the transcript under a "substantial evidence" standard. The conviction was affirmed on December 6, 1999. A Petition for Writ of Mandamus or in the alternative Petition for Writ of Certiorari was filed with the Supreme Court of Nevada on January 4, 2000. That Petition was denied on January 5, 2000.

II
JURISDICTION

This Court has jurisdiction pursuant to 28 USC § 2101; Rule 13 of the Rules of the United States Supreme Court. The Nevada Supreme Court denied Petitioner's Petition for Writ of Mandamus or in the Alternative Petition for Writ of Certiorari on January 5, 2000.

III
CONSTITUTIONAL PROVISION AND STATE STATUTES

This Petition for Writ of Certiorari is based upon the 14th Amendment to the United States Constitution which provides, in pertinent part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges

or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

. . . .

NRS 200. 481 (1) provides:

(a) Battery" means any willful and unlawful use of force or violence upon the person of another.

NRS 200.485 provides:

1. Unless a greater penalty is provided pursuant to NRS 200.481, a person convicted of a battery that constitutes domestic violence pursuant to NRS 33.018:

(a) For the first offense within the immediately preceding 7 years, is guilty of a misdemeanor and shall be sentenced to:

(1) imprisonment in the city or county jail or detention facility for not less than 2 days, but not more than 6 months; and

(2) Perform not less than 48 hours, but not more than 120 hours, of community service. The person shall be further punished by a fine of not less than $200, but not more than $1,000. A term of imprisonment imposed pursuant to this paragraph may be served intermittently at the discretion of the judge or justice of the peace, except that each period of confinement must be not less than 4 consecutive hours and must occur either at a time when the person is not required to be at his place of employment or on a weekend.

.....

2. In addition to any other penalty, if a person is convicted of a battery which constitutes domestic violence pursuant to

NRS 33.018, the court shall:

(a) For the first offense within the immediately preceding 7 years, require him to participate in weekly counseling sessions of not less than 1 ½ hours per week for not less than 6 months, but not more than 12 months, at his own expense, in a program for the treatment of persons who commit domestic violence that has been certified pursuant to NRS 228.470.

3. In addition to any other fine or penalty, the court shall order such a person to pay an administrative assessment of $35. Any money so collected must be paid by the clerk of the court to the state treasurer on or before the fifth day of each month for the preceding month for credit to the account for programs related to domestic violence established pursuant to NRS 228.460.

4. In addition to any other penalty, the court may require such a person to participate, at his own expense, in a program of treatment for the abuse of alcohol or drugs that has been certified by the bureau of alcohol and drug abuse in the department of human resources.

5. If a person is charged with committing a battery which constitutes domestic violence pursuant to NRS 33.018, a prosecuting attorney shall not dismiss such a charge in exchange for a plea of guilty, guilty but mentally ill or nolo contendere to a lesser charge or for any other reason unless he knows, or it is obvious, that the charge is not supported by probable cause or cannot be proved at the time of trial. A court shall not grant probation to and, except as otherwise provided in NRS 4.373 and 5.055, a court shall not suspend the sentence of such a person.

6. For the purpose of this section:

(a) "Battery" has the meaning ascribed to it in paragraph (a) of subsection 1 of NRS 200.481; and

(b) "Offense" includes a battery which constitutes domestic violence pursuant to NRS 33.018 or a violation of the law

of any other jurisdiction that prohibits the same or similar conduct.

.....

NRS 33.018 provides:

> Domestic violence occurs when a person commits one of the following against or upon another to whom he is related by blood or marriage, with whom he is or was actually residing, with whom he had or is having a dating relationship or with whom he has a child in common, or upon his minor child or a minor child of that person:
>
> (a) A battery.
> (b) An assault.
> (c) Compelling the other by force or threat of force to perform an act from which he has the right to refrain or to refrain from an act which he has the right to perform.
> (a) A sexual assault.
> (b) A knowing, purposeful or reckless course of conduct intended to harass the other. Such conduct may include but is not limited to:
> (a) Stalking.
> (b) Arson.
> (c) Trespassing.
> (d) Larceny.
> (e) Destruction of private property.
> (f) Carrying a concealed weapon without a permit.
> (g) A false imprisonment.
> (h) Unlawful entry of the other's residence, or forcible entry against the other's will if there is a reasonably foreseeable risk of harm to the other from the entry.

.....

IV
STATEMENT OF THE CASE

On July 15, 1998, Defendant/Petitioner, James Guesman, a Nevada attorney, was charged with domestic battery. The Complaint against Defendant stated:

> That the said Defendant, on or about the 5th day of May 1998, at and within the County of Clark, State of Nevada, did then and there wilfully and unlawfully use force or violence against or upon the person of his spouse, former spouse, any other person to whom he is related by blood or marriage, a person with whom he is or was actually residing, a person with whom he has had or is having a dating relationship, a person with whom he has a child in common, the minor child of any of those persons or his minor child, to wit: COLLETTE PUTNAM, by grabbing her around the neck and/or by slamming the head of the said COLLETTE PUTNAM against the wall and/or by threatening to "knock her out".
>
> . . . .

See copy of criminal complaint, Appendix, Exhibit "A."

Defendant pled not guilty on September 3, 1998, and the matter went to trial on October 9, 1998, at which time Defendant was found guilty by a visiting Justice Court Judge from Northern Nevada. Defendant appealed to the Eighth Judicial District Court, Nevada's Court of general jurisdiction. After Defendant and the State of Nevada briefed the issues before the District Court, oral argument was held, and the conviction was affirmed on December 6, 1999.

The only issue before the State District Court was whether

substantial evidence existed before the Justice Court to warrant Defendant's conviction.

A Petition for Writ of Mandamus or in the Alternative Petition for Writ of Certiorari was filed in the Supreme Court of Nevada on January 4, 2000. Appendix, Exhibit "B." The federal constitutional issue was first presented to the Nevada Supreme Court in the Petition for Writ of Mandamus or in the Alternative Petition for Writ of Certiorari. On January 5, 2000, the very next day, the Petition was denied by Nevada's highest court in a written Order. Appendix, Exhibit "C".

This Petition for Writ of Certiorari follows, and is based upon the failure of the Supreme Court of Nevada to follow applicable law of this Court dealing with a constitutional appellate review under a "substantial evidence" standard.

V
REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

This Court should grant this Petition for Writ of Certiorari for the reason that the Nevada Supreme Court (and the State District Court) have determined that a sufficiency-of-the evidence issue that conflicts with the rulings of this Court. If the State courts in Nevada are incorrect in applying the federal constitutional standard in this case, they probably are misapplying that standard in other cases as well.

This legal argument does **not** ask this Court to review the facts of the case and make a determination of whether substantial evidence exits for Defendant's conviction; rather, this Court is requested to clarify an apparent misapprehension of the State District Court and the Supreme Court of Nevada of the "substantial evidence" standard of appellate review, and to Order those Courts to re-evaluate the transcript of the Trial.

As applied by the State District Court, the injury to the alleged victim, and the Justice Court's finding on the credibility

of witnesses were the only issues felt appropriate to review in affirming the conviction. The State District Court at 30:22-31:10 of the transcript of oral argument declared:

> The unrebutted evidence that I found from the record is that the lady did end up with a bump on the back of her head. The doctor testified to it, she testified to and the police officer taking the report the following day testified to it. So that's a fact. Now, the question is how did she get the bump on her head. Did she get the bump on her head the way she testified to it or did she get the bump on her head the way the defendant testified to it? That is an issue of credibility, and this Court doesn't determine credibility of witnesses, and because of that the Court cannot do anything other than uphold the decision of the lower court.

The briefs of the parties in the State District Court centered around the various inconsistences (some rather stark) in the testimony and evidence presented to the Justice Court by the State of Nevada witnesses.

Before the Supreme Court of Nevada, Defendant's Petition was summarily denied, although Defendant's legal argument centered on the State District Court's failure to consider **all** the evidence, not just selected portions thereof.

Defendant requests only that the reviewing Court consider **all** the evidence adduced, which request is in line with this Court's previous rulings.

This Court declared, in Glasser v. United States, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942), that:

> It is not for us to weigh the evidence or to determine the credibility of witnesses. The verdict of a jury must be sustained if there is substantial

> evidence, taking the view most favorable to the Government....
>
> .....

In Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed. 2d 560 (1979), this Court declared, at 443 U.S. 320, 99 S.Ct. 2789, that:

> ....(t)his inquiry does not require a court to "ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt." Woodby v. INS, 385 U.S., at 282, 87 S.Ct., at 486 (emphasis added). Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See Johnson v. Louisiana, 406 U.S., at 362, 92 S.Ct., at 1624-1625. This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution....
>
> .....

This Court, then, has specifically held that the due process clause requires that an appeals court review **all** of the evidence in a case, even though that evidence is considered in the light most favorable to the prosecution. This, then, is Petitioner's complaint. The State District Court did not consider the **entire** record; that

Court merely concluded that an injury occurred, and because the lower (Justice) court determined credibility and found Defendant guilty, he was **ipso facto** guilty.

Such a review of isolated parts of the record, leaving Defendant's own defense version of what occurred, and the impeaching evidence of the alleged victim at Trial, completely unreviewed, denied Defendant due process of law.

In United States v. Powell, 469 U.S. 57, 105 S.Ct. 471, 83 L.Ed. 2d 461 (1984), this Court again defined "sufficiency-of-the-evidence" review at 469 U.S. 67, 105 S.Ct. 478 in these words:

> Finally, we note that a criminal defendant already is afforded protection against jury irrationality or error by the independent review of the sufficiency of the evidence undertaken by the trial and appellate courts. This review should not be confused with the problems caused by inconsistent verdicts. Sufficiency-of-the evidence review involves assessment by the courts of whether the evidence adduced at trial could support any rational determination of guilty beyond a reasonable doubt. See Glasser v. United States, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942); Fed. Rule Crim. Proc. 29(a); cf. Jackson v. Virginia, 443 U.S. 307, 316, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979).

.....

There was no "assessment" by the State District Court of the evidence adduced at Trial, and on the filing of a petition for writ, the Nevada Supreme Court did not Order the State District Court on remand to review the whole record. Indeed, it is curious that the Nevada Supreme Court filed the Petition on January 4, 2000 and denied the Petition the next day, January 5, 2000. See Appendix, Exhibit "B," Order of Supreme Court of Nevada. How

the Nevada Supreme Court itself could have maturely considered the issue and attendant record in this period of time is somewhat of a mystery.

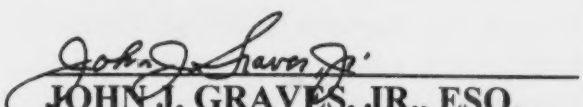
Finally, to demonstrate Defendant's dilemma, in Wright v. West, 505 U.S. 277, 112 S.Ct. 2482, 120 L.Ed. 2d 225 (1992), Justice Thomas, in a case involving the issue of whether mixed constitutional questions were subject to plenary or deferential federal review on habeas corpus, reviewed all of the actual facts in a sufficiency-of-the-evidence review. 505 U.S. 295, 112 S.Ct. 2492. Justice Thomas found, in reviewing Defendant's testimony in that case, that the testimony was vague and weak; on cross-examination, Defendant came across again as vague, contradictory, and evasive. Even this sort of cursory review was not afforded Defendant (in the case at bar) in his sufficiency-of-the-evidence review in State District Court. Further, as the briefs filed by Defendant in the State District Court would reveal, significant testimony and evidence contradicted the alleged victim's story at the Trial itself.

Even **if all** the evidence is to be considered in the light most favorable to the prosecution, Defendant wants the State courts to at least review **all** the evidence, not just parts of it.

VI
CONCLUSION

For the above-described reason, this Court should grant Defendant's Petition for Writ of Certiorari, allow briefing and oral argument on the issue, and Order the State courts to grant Defendant Guesman a proper sufficiency-of-the-evidence review of his Trial transcript.

SUBMITTED BY:



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